1981 Compilation

of the

Superintendent of Public Instruction's *Decisions and Order*

and

Related Legal Information

Legal Services Division
Office of Public Instruction
Ed Argenbright, Superintendent
State Capitol
Helena, Montana 59620

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INTRODUCTION

The material contained in this booklet is intended for informational purposes only to assist school officials in the state in making decisions at the local level. It is our hope that this information will be useful to you in carrying out the responsibilities of your office.

Legal Services Division
Office of Public Instruction

SECTION I

DECISIONS AND ORDER

BEFORE THE STATE OF MONTANA

SUPERINTENDENT OF PUBLIC INSTRUCTION
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In the matter of the Appeal of BOARD OF TRUSTEES OF SCHOOL DISTRICT NO. 9, OPHEIM, MONTANA	)	DECISION AND ORDER

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This is an Appeal by the Board of Trustees of School District No. 9, Opheim, Montana, from a decision of Harry L. Axtmann, sitting in place of the County Superintendent of Schools of Valley County, Montana. The hearing examiner reversed the decision of the Board of Trustees of School District No. 9, (hereinafter referred to as the Board), not to renew the contract of Clyde Knudsen, (hereinafter referred to as Respondent).

Respondent is a tenured teacher and served in the Opheim schools for nine consecutive years. On March 24, 1981, the Board voted not to renew the contract of Respondent. The Board gave Respondent notice of its decision along with a statement of reasons. On April 17, 1981 the Respondent requested a hearing before the Board to have its decision reconsidered. On April 22, 1981 the Board conducted a hearing to reconsider its decision. Respondent was given due notice and was present at the hearing. The Board reaffirmed its decision of March 24, 1981 not to renew Respondent's contract.

The statement of reasons, which was a reflection of the statement of reasons provided earlier to Respondent, cited the following grounds for the Board's decision:

1. Respondent violated Board policy by failing to attend all teachers meetings called by the Principal and Superintendent, including Orientation Day, August 21, 1980, and Teacher's Appreciation Night,

October 9, 1980;

2. Respondent violated Board policy by failing to provide the school administration an official statement of years of service and an official transcript of credits, despite being requested to do so by the Superintendent.

3. Respondent violated Board policy by conducting himself in an unprofessional manner with fellow staff members and teachers, including confrontations with the high school secretary and fellow teachers;

4. Respondent violated Board policy in that he has not strived to improve the relationship between himself and the community.

5. Respondent failed to correct certain inadequacies directed to his attention by the Board.

Respondent appealed that board decision to the Valley County Superintendent of Schools pursuant to Section 20-3-310, M.C.A. The Valley County Superintendent disqualified himself from this case. He appointed Mr. Harry Axtmann as the Hearing Examiner. A hearing was conducted. The Hearing Examiner issued Findings of Fact, Conclusions of Law and Order reversing the Board's decision. The Board appeals from that decision.

The Administrative Procedures Act applies to appeals such as the one presented here. Section 2-4-704, M.C.A. provides a standard of review which I have adopted in reviewing the Findings of Fact, Conclusions of Law and Order. Section 2-4-704, M.C.A. states:

> Standards of review. (1) The review shall be conducted by the court without a jury and shall be confined to the record. In cases of alleged irregularities in procedure before the agency not shown in the record, proof thereof may be taken in the court. The court, upon request, shall hear oral argument and receive written briefs.
>
> (2) The court may not substitute its judgement for that of the agency as to the weight of the evidence on questions of fact. The court may affirm the decision of the agency or remand the case for further proceedings. The court may reverse

or modify the decision if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are:

(a) in violation of constitutional or statutory provisions;

(b) in excess of the statutory authority of the agency;

(c) made upon unlawful procedure;

(d) affected by other error of law;

(e) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record;

(f) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion; or

(g) because findings of fact, upon issues essential to the decision, were not made although requested.

The sections applicable to non-renewal of tenured teachers are Sections 20-4-203, 20-4-204 and 20-4-205, M.C.A. No legislative guidelines have been drafted that a school board is required to follow in deciding whether or not to renew a tenured teacher's contract.

Respondent cites Yanzick v. School District No. 23, Lake County, Montana State Superintendent, Georgia Rice's Decision and Order dated September 14, 1979, for the rule that the reasons given for non-renewal are left to the sound discretion of the local trustees and should not be held insufficient unless they are wholly inappropriate and constitute an abuse of discretion. The District Court for the First Judicial District of the State of Montana, in Yanzick v. School District No. 23, Lake County, Montana, Cause No. 44513, MEMORANDUM AND ORDER found that standard erroneous. The District Court noted the extent of such School Board discretion has been addressed and considered in federal and state jurisdictions. It has been widely concluded that constitutional rights of tenured teachers limit the board's discretion in dismissing tenured teachers. In attempting to define the scope of the school board's discretion, the district court recognized a conflict of interest: those belonging to the teacher as a tenured employee and as an individual versus the interest of the school community and its children. Yanzick v. School District No. 23, p.3.

The argument that a county superintendent or higher authority may only reverse the decision of the board of trustees where there has been a clear abuse of discretion, i.e. where the board's reasons have no basis in fact, is error. See Yanzick. The State Superintendent is an administrative appeals judge. When a district court reverses the State Superintendent's decision, as was in the case of Yanzick, the law the State Superintendent developed is reversed and void and the district court's Order and Memorandum becomes law. Because of the timing of this appeal, I attempted to withhold an opinion until such time as the Montana Supreme Court clarifies and reviews the District Court Order in Yanzick. Yanzick v. Board of Trustees, School District No. 9, Montana Supreme Court, Docket No. 80-394. Because of the need of expediting this case for the parties involved, I have been unable to receive an opinion from the Montana Supreme Court and therefore must follow the district court rule as outlined in the Memorandum and Order.

The courts have taken away many of the powers of the local board of trustees in determining whether in fact a tenured teacher may be denied a contract. The Montana Supreme Court has declared that tenure is "substantial, valuable, and beneficial." State ex. rel. Saxtorph v. District Court, Fergus County, 128 Mont. 253, 275 P. 2d 209 (1954). The Board, not Respondent, has the burden of proving by preponderance of the evidence the charge or charges which is the basis for non-renewal of his teaching contract. Conley v. Board of Education, 143 Conn. 488, 112 A.2d 747; Board of Education v. Shockley, 52 Del. 237, 155 A.2d 323.

The Board must show good cause. Courts have often held that the meaning of good cause is not restricted to specifically enumerated causes, but includes any cause which bears a reasonable relation to the teacher's fitness and capacity to discharge the duties of his position.

McQuaid v. State, 211 Ind. 595, 6 N.E. 2d 547, 118 Alr. 1079. See also Yanzick. "In order to maintain a reasonable balance between the interest of the teacher and the school community on behalf of its children, the courts have construed an implied qualification to the statutory language: there must be a rational nexus between the teacher's conduct and his teaching. In other words, the school board cannot characterize a teacher's conduct as immoral and dismiss him on that basis unless that conduct indicates that the teacher is unfit to teach." Yanzick.

I am not totally inclined to agree with that standard. The Board has statutory and constitutional powers as outlined by the Constitution. I have continued to maintain that the control and direction of the school rests within the local school board's authority and discretion who are accountable to the people in their districts. A school teacher has a very great impact on the young, impressionable minds, and for that reason all aspects of his or her life that could influence a student are subject to scrutiny by employers. That must always be the case in order that our young people in this state receive and are guaranteed the basic instruction prescribed by the statute. However, at the same time, I must recognize, as the State Superintendent that my dictates are not always law. Courts have taken the major step in this area and have declared that teachers, as individuals, have constitutionally guaranteed rights. State ex. rel. Zander v. District Court of Fourth Judicial District, 36 St. Rptr. 489, 591 P. 2d 656 (1979), State v. Colburn, 165 Mont. 488, 530 P. 2d 442 (1974). I cannot avoid these decisions.

Unfortunately, both Appellant's and Respondent's briefs have failed to be guided by the correct standards of review or the recent developments in Montana Courts on non-renewal of tenured teacher contracts.

Unless directed otherwise by the Montana Supreme Court, a district

court or an administrative appeals judge may not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact. Section 2-4-711 (2) M.C.A. I may reverse or modify the decision if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions or decisions are

(a) in violation of constitutional or statutory provisions;
(b) in excess of the statutory authority of the agency;
(c) made upon unlawful procedure;
(d) affected by other error of law;
(e) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record;
(f) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion; or
(g) because findings of fact, upon issues essential to the decision, were not made although requested.

From the readings of the briefs submitted to the hearing examiner and the State Superintendent, the Board does not contest violation of the first four provisions. The issue is whether the Findings of Fact, Conclusions of Law and Order is 1) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record, or 2) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion or 3) because a finding of fact, upon issues essential to the decision, were not made although requested.

I have reviewed the transcript of the record with great scrutiny.

The Hearing Examiner viewed the witnesses, heard the testimony, and weighed the evidence. The Montana Supreme Court has said, and I agree that the hearing examiner who is the closest to the dispute who viewed the witnesses and examined the testimony has a better understanding of the case than would an administrative appellate judge. Applying the standards of review to the specific allegations of absence from teachers' meetings, orientation day, teacher's appreciation night, or unprofessional conduct, I find that there was no clearly erroneous findings of fact in view of the reliable probative and substantial evidence on the whole

record. I cannot review the record in a different light but than what is stated under the standard of review in the administrative procedures act. The hearing examiner's Findings of Fact, Conclusions of Law and Order was not acted on arbitrarily or capriciously or characterized by abuse of discretion or clearly unwarranted exercise of discretion. Poor communications between the particular teacher involved and the school administration resulted in an unfortunate situation.

The school board asserted that the Respondent has not improved his teaching and stayed at the same level he had had for the past several years. A review of the record reflects testimony of students and parents who alike testified Respondent was one of the best teachers in the school system, as a person who has the fewest disciplinary problems of any teacher. The Opheim School has made several achievements in the science area and are comparable to other larger high schools. That indicates concern on the part of the Board, administration and faculty. A vague allegation without specific facts that Respondent's program was not improving was not sufficiently documented so as to allow the State Superintendent, under the Standard of Review, to reverse the decision of the hearing examiner. In fact, testimony in the record indicated that the school administration found Respondent's teaching to be acceptable and satisfactory. I must always be reminded that this particular person has tenured rights, therefore, it is a substantial and valuable right that cannot be lightly set aside.

The record, on the whole, indicates that this school board has failed to find nexus to which there is community loss of support to the effectiveness of the teaching of this particular Respondent. The record discloses that there are a group of dissatisfied concerned persons in the Opheim area who requested Respondent's removal. However, the

for Montana issued a Writ of Mandamus ordering the County Superintendent to hold a transportation committee hearing. The Beaverhead County Transportation Committee conducted a hearing on January 10, 1980 and prepared a transcript of the proceedings. The Chairman of the Beaverhead County Transportation Committee entered findings of fact, conclusions of law and order.

The findings indicate that Appellant and her two children have resided five miles south of Sheridan, Madison County, Montana for the last three years, 1977, 1978, and 1979. Appellants' children have attended Sheridan Public Schools in Sheridan, Montana. Appellants and their children have not resided at their property in the Centennial Valley. Neither child has attended the Lima High School during this time period. Kenneth Simonsen resides in Sheridan, Montana, and is employed in the Butte mining operation. Because of the severe winters in Beaverhead County, Appellants testified that they decided to move their children to Sheridan, Montana rather than transport them from the ranch in Beaverhead County to the Lima School.

Section 20-10-121 (2) M.C.A. (1979) states:

> The tendering of a contract to the parent or guardian whereby the district would pay the parent or guardian for individually transporting the pupil or pupils shall fulfill the district's obligation to furnish transportation for an eligible transportee.
>
> An eligible transportee shall mean a public school pupil:
>
> (a) is not less than five years of age nor has attained his twenty-first birthday;
>
> (b) is a resident of the state of Montana;
>
> (c) regardless of district and county boundaries, resides at least three miles over the shortest practical route from the nearest operating public elementary school or public high school, whichever the case may be; and
>
> (d) is deemed by law to reside with his parent or guardian who maintains legal residency within the boundaries of the district furnishing the transportation regardless of where the eligible transportee actually lives when attending school.

Section 20-10-105 M.C.A. states that when the residence of an eligible

transportee is a matter of controversy and is an issue before the Board of Trustees, the County Transportation Committee, or the Superintendent of Public Instruction, residence shall be determined on the basis of Section 1-1-215 M.C.A.,

> Every person has, in law, a residence. In determining the place of residence, the following rules are observed:
>
> (1) It is the place where one remains when not called elsewhere for labor or other special or temporary purpose and to which he returns in seasons of repose,
>
> (2) There can only be one residence,
>
> (3) A residence cannot be lost until another is gained,
>
> (4) The residence of his parents or, if one of them is deceased or they do not share the same residence, the residence of the parent having legal custody or, if neither parent has legal custody, the residence of the parent with whom he customarily resides is the residence of the unmarried minor child.
>
> (5) The residence of an unmarried minor who has a parent living cannot be changed either by his own act or that of his guardian.
>
> (6) The residence can be changed only by the union of act and intent.
> Section 1-1-215 M.C.A. (1979)

The Montana Supreme Court has attempted to clarify the definition of residence. In Kunesh v. City of Great Falls, 132 Mont. 285, 317 P.2d 297 (1957), the Court said residence is a place where a man makes his home.

> ...however, these (Section 1-1-215 M.C.A.) are guides for interpretation, they are not a definition. This is unavoidable, for as Mr. Justice Holloway observed in Carwile v. Jones, 38 Mont. 590, at page 602, 101 P. 153, at page 158, "It is as easy to understand the meaning of 'residence' as it is to understand the meaning of some of the terms used in the rules for determining the meaning of 'residence'. Every case must stand on its own facts, and a decision in any event must, of necessity, be the result of a more or less arbitrary application of the rules of law to the facts presented."

The record indicates Appellants are not residents of Beaverhead County, Montana. Appellants were not registered to vote in Beaverhead County during the time of controversy; they did not license their vehicle in

Beaverhead County; they maintained no telephone or utility bills in Beaverhead County; their "home" on their pasture land in Beaverhead County is uninhabitable; the Beaverhead County Assessor has described the buildings on the Appellants' property as being adandoned; and having a scrap material value of $300. The ranch has no electricity or running water. Also, Appellants did not live or remain at their pasture land at Beaverhead County when not called elsewhere for labor or other special or temporary purposes, nor did they return there in seasons of repose. They lived in and returned to Sheridan, Madison County, Montana.

Appellants contend that they have maintained and "intended" to reside within Beaverhead County. Appellants must have more than intent to effect the desire of maintaining a residency in Beaverhead County. Intent does not rest with a man to determine the place of his domicile by expressing intent, which is contrary to the facts in an attempt to avoid the inevitable legal consequences of such facts. 25 Am. Jur. 2D Domicile, Section 24, pages 18-19.

> More weight and importance will be given to a person's acts than to his declarations, and when they are inconsistent, the acts will control. It is said in this connection that actions speak louder than words, but that the words are to be heard for what they are worth.
>
> This intention, it is true, may be inferred from circumstances, and the residence may be of such a character and accompanied by such indices of a permanent home that the law will apply to the facts a result contrary to the actual intention of the parties. Veseth v. Veseth, 141 Mont. 169, 410 P.2d 930 (1966).

Appellants present a case where there is substantial evidence of actual residence in one place, Sheridan, Montana, but contradicted by an undisclosed intention to live in or return to another. The facts clearly speak louder than the intent of Appellants. As the Montana Supreme Court said in Kunesh v. City of Great Falls, 317 P. 2d 297 (1956), while the word "residence" has been involved in many controversies..it will be found that it is not the word itself that has been difficult of understanding. It has been in the construction of language expressive of the effect of residence, and

of the rights arising therefrom, and based on the fact of residence. In each such case, the word becomes a part of a concept larger than itself, such as a residence necessary to the right to vote, residence in establishing a domicile, residence necessary for citizenship, etc.

In the larger concept of residence, Appellant has failed to maintain a residence on the ranch property in a way to meet the requirements set out by Section 1-1-215 M.C.A. If Appellants' residence was determined to be in Beaverhead County under the evidence in this case, such precedent would cause havoc in all school districts in the state with similar disputes.

During oral argument, Appellants contended that a Fifth Judicial District court order entered in the case of Lima School District No. 12 and Elementary School District Of Beaverhead County, Montana v. Kenneth Simonsen and Ann Simonsen, Case Number 9285, was controlling over this administrative appeal. I disagree.

The matter of the school transportation contract between the parties in this action, including the contract which is a part of the judicial dispute, is presently before the State Superintendent of Public Instruction as provided by Section 20-3-107 M.C.A.

This Appeal was properly presented to the State Superintendent of Public Instruction and I assumed jurisdiction. "The decision of the Superintendent of Public Instruction shall be final, subject to the proper legal remedies in the state courts. Such proceedings shall be commenced no later than sixty days after the date of the decision of the Superintendent of Public Instruction." (Emphasis added) Section 20-3-107 (2) M.C.A.

If an administrative remedy is provided by statute, relief must be sought from the administrative body and the statutory remedy must be exhausted before relief can be obtained by judicial review. State ex. rel. Jones v. Gilde, 168 Mont. 130, 541 P.2d 355 (1975), State ex. rel. Sletten Const. Co. v. City of Great Falls, 163 Mont. 307, 516 P.2d 1149 (1973).

This controversy contains the same subject matter, issues, and parties as is addressed in the District Court action and is subject to administrative review prior to judicial action. Appellants had not exhausted the administrative remedies and were therefore barred from pursuing this case in a court of law until such time as a final decision had been rendered by the Superintendent of Public Instruction. I conclude, therefore, that the Order of the Fifth Judicial District of the State of Montana, in and for the County of Beaverhead, is not controlling in this Appeal. Proper judicial appeal should be made upon the final determination of the State Superintendent.

The Beaverhead County Transportation Committee's Order is affirmed.

DATED SEPTEMBER 4, 1981.

BEFORE ED ARGENBRIGHT, SUPERINTENDENT OF

PUBLIC INSTRUCTION FOR THE STATE OF MONTANA

****

IN RE: THE APPEAL OF)
) DECISION AND ORDER
IRENE D. SORLIE)

****

This is an Administrative Appeal from a decision rendered by the Yellowstone County Superintendent of Schools, dated March 26, 1981. Following notice of appeal, timely filed by the Appellant, a notice and schedule of this matter was served on all parties. The parties hereto, represented by counsel, have had an opportunity to brief the matter in accordance with that schedule and have orally argued their position before the State Superintendent of Public Instruction on September 10, 1981. The State Superintendent now renders his decision.

There was no dispute below relative to the basic facts presented by this case. Irene D. Sorlie was employed by School District No. 2 in 1951, as a classroom teacher and taught until 1978, when she was offered and accepted an administrator's contract to perform the duties of Coordinator of Intermediate Education. On March 31, 1980, the School District notified Mrs. Sorlie of her re-employment for the 1980-81 school year, which Mrs. Sorlie accepted. On May 5, 1980, the initial mill levy was not approved by the voters of Yellowstone County. A new reduced mill levy was approved by the voters on June 16, 1980. On June 27, 1980, Mrs. Sorlie was advised by the School District, that she would be assigned as a fourth (4th) grade teacher, and on July 11, at her request, she was assigned and accepted a position as a second (2nd) grade teacher "at a salary approximately $3,000.00 less per year."

On July 13, 1980, she advised the School District that such an assignment was both a demotion as to salary and position. Mrs. Sorlie

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On July 13, 1980, she advised the School District that such an assignment was both a demotion as to salary and position. Mrs. Sorlie

requested the reasons for her demotion in service. A hearing was held before the Board of Trustees on September 16, 1980, where the Trustees reaffirmed their earlier decision to reassign Mrs. Sorlie to the classroom and reduce her salary. Mrs. Sorlie appealed the matter to the Yellowstone County Superintendent of Schools, who held a hearing on December 19, 1980.

This appeal is governed by the Montana Administrative Procedures Act, § 2-4-704, M.C.A., which provides:

> Standards of review. (1) The review shall be conducted by the court without a jury and shall be confined to the record. In cases of alleged irregularities in procedure before the agency not shown in the record, proof thereof may be taken in the court. The court, upon request, shall hear oral argument and receive written briefs.
> (2) The court may not substitute its judgement for evidence on questions of fact. The court may affirm the decision of the agency or remand the case for further proceedings. The court may reverse or modify the decision if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are:
> (a) in violation of constitutional or statutory provisions;
> (b) in excess of the statutory authority of the agency;
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> (e) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record;
> (f) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion; or
> (g) because findings of fact, upon issues essential to the decision were not made although requested.

The State Superintendent applies this scope of review to the decision of the County Superintendent.

Was Mrs. Sorlie entitled to the protection of the Montana State Tenure Statutes in her administrative position as Coordinator of Intermediate Education. The State Superintendent finds error in all three conclusions of law determined by the County Superintendent.

Section 20-1-101,M.C.A., provides that a teacher is one who:

> "is employed by a District as a member of its instructional, supervisory, or administrative staff."

Clearly, from the facts presented to the County Superintendent, Mrs. Sorlie did acquire tenure as a teacher. In fact, both parties do not disagree with this legal conclusion. Further, in view of this State statute, I hold as a matter of law that the position of elementary teacher is comparable to the position of Coordinator of Intermediate Education, for purposes of tenure.

Clearly, under the facts presented to the County Superintendent, Mrs. Sorlie did acquire tenure as a teacher for her service of almost twenty continuous years to the Yellowstone County Elementary Districts. See § 20-4-203 M.C.A.

Finally, in view of my reversal of the earlier two conclusions of law, it follows that the Elementary School District did violate the tenure rights of Irene D. Sorlie by reducing her salary for 1980-81. Mrs. Sorlie, as I have held, did acquire tenure as a teacher. Her reassignment to a teaching position was not a violation of her tenure rights, however the reduction in salary was. See §20-4-203 M.C.A. The statute is clear, and for the school year 1980-81 Mrs. Sorlie was re-elected at the same salary as that provided by the last executed contract.

I conclude by noting that the statute provides sufficient flexibility for administrators to deal with reorganizational needs as well as providing some protection and assurances to those who are able to serve the School District in administrative or supervisory positions.

To the extent that this decision is inconsistent with the appeal of Gordon Halverson rendered at the conclusion of my predecessor's term, it is expressly overruled.

Based on the foregoing, the decision of the Yellowstone County Superintendent is hereby reversed and the appellant is to have her contract at the same salary as that provided by her last executed contract.

DATED SEPTEMBER 28, 1981

BEFORE THE STATE OF MONTANA

SUPERINTENDENT OF PUBLIC INSTRUCTION

****

In the matter of the Appeal of)
JAMES C. HOLTER) DECISION AND ORDER

****

This Appeal is by a tenure teacher, James C. Holter, in the Nashua school system who has appealed the decision of the Valley County Superintendent of Schools affirming his termination by the Board of Trustees of Valley County School District No. 13. The Conclusions of Law issued by the Valley County Superintendent of Schools cited §20-4-203 and §20-3-204 Montana Code Annotated (hereinafter referred to as M.C.A.). That Appeal was pursuant to §20-3-210 M.C.A. This Appeal is pursuant to §20-3-107 M.C.A.

The Appellant and Respondent have submitted briefs and the case is considered submitted for decision.

The Appellant, Mr. Holter, was an instructor in the Nashua schools for 7th grade English and science. The record reflects that in school year 1980-81, Mr. Holter had acquired tenure by receiving his fourth contract at the Nashua schools.

The record reflects that Mr. Holter was certified to teach K-12 health and physical education. He was certified to teach in no other areas, yet he did also teach junior high math, science, and English for the district. The record reflects that over the past four years since Mr. Holter was employed as a teacher, the enrollment at the Nashua school dropped from approximately 285 to 215 students. It was anticipated that further decreases in enrollment would occur. Based on the reduction in enrollment, the school district decided to institute its reduction in force policy.

The issue whether or not a reduction in force was proper in this case has not been disputed by the parties.

The issue presented by this Appeal is whether the method of selecting Mr. Holter to be RIFFED was proper in view of state law and the reduction in force policy adopted by the Nashua Public Schools.

Since assuming office, I have adopted the standard of review for appeals set forth in the Montana Administrative Procedure Act, §2-4-704 M.C.A., which provides:

> (2) The court may not substitute its judgement for that of the agency as to the weight of the evidence on questions of fact. The court may affirm the decision of the agency or remand the case for further proceedings. The court may reverse or modify the decision if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are:
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> (f) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion; or
>
> (g) because findings of fact, upon issues essential to the decision, were not made although requested.

The Findings of Fact and Conclusions of Law and Order issued by the Valley County Superintendent are determinative of this Appeal and I set forth them in their entirety:

FINDINGS OF FACT

1. James Holter was a tenure teacher in the Nashua schools; with certification in P.E. K-12. (Joint exhibit #10)
2. Nashua schools have been experiencing declining enrollment in the last few years. The Board decided not to raise the rate of the voted mill levy. Various alternatives were considered by the administration. The decision was made that a reduction in force (RIF) was necessary for the 1981-82 school year.
3. Nashua has a RIF policy. (Joint exhibit #1)

CONCLUSIONS OF LAW

1. James Holter was counseled over a period of time on securing the additional certification needed to continue to teach classes in English and science.

2. Holter was teaching subjects that could be taught by other members of the staff who were endorsed in specialized fields such as business, social studies, etc.

3. The Trustees acted in accordance with all statutory procedures stated in Section 20-4-203 and 204 in dismissing Appellant.

ORDER

On the basis of the foregoing Findings of Fact and Conclusions of Law, the hearing officer upholds the decisions of the Board of Trustees, School District No. 13, in the non-renewal of the contract of James Holter for the 1981-82 school year.

The School District also relied on §39-31-303 M.C.A. which provides:

> Management rights of public employers. Public employees and their representatives shall recognize the prerogatives of public employers to operate and manage their affairs in such areas as, but not limited to:
>
> (1) direct employees;
>
> (2) hire, promote, transfer, assign, and retain employees;
>
> (3) relieve employees from duties because of lack of work or funds or under conditions where continuation of such work be inefficient and nonproductive;
>
> (4) maintain the efficiency of government operations;
>
> (5) determine the methods, means, job classifications, and personnel by which government operations are to be conducted;
>
> (6) take whatever actions may be necessary to carry out the missions of the agency in situations of emergency;
>
> (7) establish the methods and processes by which work is performed.

While neither party contends that this statute impliedly repeals or amends the rights of tenure granted to teachers, I will take the opportunity to clarify that it is my position that teacher tenure is, and continues to be, a substantial, valuable and beneficial right which cannot be taken away except for good cause. State ex.rel. Saxtorph v. District Court, Fergus County, 128 Mont. 253, 275 P. 2d 209 (1954).

I also cite the recent case of Keiser v. State Board of Regents, 630 P. 2d 194 (1981) which further discussed the academic and economic reasons for tenure.

The record reflects that of the 21 1/2 certified teachers at the Nashua

schools, 14 are tenured. The exhibits to the record indicate that at the Board of Trustees meeting on March 24, 1981 approximately 17 teacher contracts were offered or teachers were rehired. There were 4 teachers not rehired, including the Appellant. Nothing in the record reflects the status of the other 3 teachers who were not rehired. Nor was there any clear evidence of findings of the method or methods for determining Mr. Holter's RIF. Nor was there any identification of a group or class of teachers which the RIF policy was applied to in the record. It is evident from the record that there were other teachers in the Nashua school system who were able, or thought able by the Board of Trustees, to assume Mr. Holter's duties. For example, upon cross examination by the attorney for the Appellant, the district admitted that a possible replacement for the Appellant was a physical education teacher who was not tenured. The record also reflects the possibility that a tenured teacher who was not certified to teach physical education would take over Mr. Holter's class. Further, the record also indicates a possibility that the replacement teacher for English would not be tenured. The brief of the school district states that "his classes can all be taught with existing staff, all of whom are superior in tenure, certification, or both to the Appellant." Unfortunately, there are not specific findings or conclusions relative to that statement as to the method applied.

In view of the longstanding legislative and judicial support for tenure, and my duty to administer the law as I find it, and further in view of there being no specific finding as to the method clearly employed by the Nashua Public Schools in selecting Mr. Holter for a RIF, particularly when his replacement for physical education would either be nontenured or noncertified, I must reverse the decision of the Valley County Superintendent of Schools. It is central to the concept of tenure that the "same or comparable positions of employment as that provided by the last executed

contract be analyzed in the record and in the Findings, Conclusions, and Order which deal with the reduction in force of a tenure teacher." This specifically refers to the grade or school in which the teacher last taught and does not mean any teaching position in which the teacher may be certified. In order for me to uphold a RIF policy in any school in Montana involving a tenured teacher, there must be strict adherence to the concept of tenure and the economic security which the term has acquired in this state. It must be affirmatively shown that the teacher to be RIFFED was selected from a pool or group and that those who are to take over the RIFFED tenure teacher's duties are not nontenure and that in all other aspects the RIF policy has been followed. The "possibility" that such may occur is not sufficient.

The fact that Mr. Holter may not have been certified to teach math, English, or science does not cover the failure of this school district to properly apply its RIF policy with proper view toward existing tenure laws. The record, the Findings of Fact and Conclusions of Law and Order are all deficient because they do not address the RIF policy or the tenure issue.

A school district, on concluding that there is a justifiable need for RIF of a teacher position, cannot terminate a tenured teacher and retain a nontenured teacher to fill a position for which the tenured teacher was qualified. See State ex. rel. Marolt v. Independent School District No. 695, 1099 Minn. 134, 217 N.W. 2d 212 (1974). See also the discussion in 100 A.L.R. 2d 1184, which states:

> In a selection of a teacher or teachers to be dismissed or suspended upon a reduction in the number of teachers employed, or upon the abolishment of a position, class, or activity and in the absence of any expressed statutory basis for such selection, it has been held that the school board cannot dismiss or suspend a tenured teacher and retain a nontenured teacher, at least where the nontenured teacher is retained to teach in the same position

or in the same general area of competence, interest, and training as the tenured teacher.

I hold that the burden of proving such a selection was properly conducted and made remains with the school district which is implementing its RIF policy. Such burden must be clearly met by the school district or I will be forced to reverse the decision in view of the longstanding legislative and judicial recognition of tenure.

The decision of the Valley County Superintendent of Schools is reversed and the Appellant, Mr. Holter, is ordered to be reinstated.

DATED DECEMBER 30, 1981.

BEFORE THE SUPERINTENDENT OF PUBLIC INSTRUCTION

OF THE STATE OF MONTANA

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In the matter of the Appeal of)
TERRY MACKIE,)
and)
THE DEPARTMENT OF SOCIAL AND REHABILITATION SERVICES.)

DECISION AND ORDER

****

This is an appeal from a decision of a Hearing Officer for the Blaine County Superintendent of Schools, rendered January 27, 1981, which affirmed the decision of School District #10, of Blaine County, that it was not responsible for the tuition of R.H., a handicapped child, with visual perception problems, who is a slow learner. The decision also provided that the Department of Public Welfare of Blaine County was responsible for the tuition of the child, who is attending school at the Intermountain Deaconess Home in Helena. Both the Blaine County Department of Public Welfare and the Department of Social and Rehabilitation Services have appealed that decision.

This appeal was noticed for submission to the Superintendent and the time for submission of briefs, arguments and requesting oral argument has expired.

I believe two issues are presented on the appeal:

1. Whether the Hearing Officer properly determined that School District #10, of Blaine County was not responsible for the tuition of R.H.

2. Whether the Hearing Officer properly determined that the Department of Public Welfare of Blaine County was responsible for the tuition of R.H. at the Helena School.

In the material submitted by the parties to me for consideration, much has been written about the statutory grounds for and against the decision; but a brief discussion of the facts, I believe, is also important to this decision.

R.H. is a fourteen (14) year old boy, who was declared a dependent and neglected child by the District Court of the Twelfth Judicial District of Blaine County, on August 5, 1975. The transcript reveals that he had several placements between 1975 and 1979 and that between January 12, 1979 and January 21, 1979, he was temporarily placed with his mother and then removed. Next he was placed in a foster home on the Fort Belknap Reservation, but removed because of some aggression toward the children in the foster home. He then was placed in the Denny Driscoll Home in Butte, Montana, on August 10, 1979, and remained there for only three weeks because of legal problems which arose involving that institution. On August 31, 1979, he was placed at the Intermountain Deaconess Home in Helena, where he currently resides. It is clear from the record that no Blaine County Child Study Team gave any approval or was even given the opportunity to approve or recommend any of the transfers-placements of this child.

There is a dispute in the evidence as to whether or not the child is emotionally disturbed. Several reports of psychologists which were admitted as evidence below, indicate a learning disability and or mild retardation with some behavioral problems. The Blaine County Department of Public Welfare and Department of S.R.S. strongly maintain that the child has serious behavioral problems as does a report from the Intermountain Deaconess Home.

A tuition request to pay for R.H.'s attendance in the Helena School District was denied by the Board of Trustees of School

District #10, of Blaine County, in accordance with the recommendation of a Child Study Team in that County. There were some exhibits of Lewis and Clark County Child Study Team recommendations also filed at the County Superintendent's Hearing.

LAW

With regard to the first issues, as to whether or not there is any financial obligation on Blaine County for the tuition of R.H., in the Helena School System, the Appellants in their Brief, do not challenge the ruling of the Hearing Officer with regard to the County's financial responsibility. It seems therefore that there is really no appeal with regard to the first issue and it is therefore affirmed. In later submissions to the State Superintendent. the Appellants do cast some doubt on the statutory authority for this ruling and therefore I do take this opportunity to set forth the applicable law in this area.

Montana's Statutes and Regulations on Special Education of Handicapped Children are mandated by Federal Law. Education of the Handicapped Act, 20 U.S.C. § 1401 through 1461.

That Act specifically identifies and defines the "State Educational Agency" and the "Local Education Agency" and then proceeds to establish and mandate certain responsibilities for educating the Handicapped to these agencies. 20 U.S.C. 1401 (7), (8). In addition the term "free appropriate public education" and the term "individualized education program" are also specifically defined in that Section of the Federal Statute. 20 U.S.C. 1401 (18), (19).

In 20 U.S.C. 1412, the eligibility requirements for a State are established and in particular, it is required that:

> (4) Each local educational agency in the State will maintain records of the individualized educa-

> tion program for each handicapped child, and such program shall be established, reviewed, and revised as provided in 20 U.S.C. 1414 (a) (5) of this title.

20 U.S.C. 1414 (a), requires that local educational agencies:

> (5) provide assurance that the local educational agency or intermediate educational unit will establish, or revise, whichever is appropriate, an individualized education program for each handicapped child at the beginning of each school year and will then review and, if appropriate, revise, its provisions periodically, but not less than annually;

Further, 20 U.S.C. 1412 (5), (6), clearly require that the State Educational Agency establish procedures to insure and control the quality of educational services provided to handicapped children. Specifically the State Educational Agency is responsible for all programs administered by any other State or Local Agency involving the education of the Handicapped Children.

In this framework, the requirements of §20-7-421 M.C.A., requiring approval of the Superintendent of Public Instruction and the Board of Trustees for the attendance of a child in need of Special Education in another District and the provisions of §10.16.1310 (1) are consistent with the Federal and State Statutes in the area. It is difficult to imagine another method of controlling out of District placements other than through the provision of § 10.16.1310 A.R.M..

Therefore, because no initial recommendation was made by the resident District Child Study Team for R.H., nor at any later time recommended by the resident District Child Study Team, the placement outside of the District relieved the Blaine County Public School System of all financial obligations.

The second issue presented by the Appeal, has consumed much of the discussions of the parties. I find no statutory basis for the State Superintendent or the local education agencies to deter-

mine the residency of a child for the purposes of assessing the cost imposed. Obviously the whole complex issue could have been avoided had the necessary cooperation existed between the various State and Local agencies at the outset.

Since there is no basis for the assessment of tuition costs to the Blaine County Department of Public Welfare, Hearing Officer's ruling with regard to the assessment of the tuition cost to that entity must be and is hereby reversed.

Hopefully, it will be painfully apparent to all concerned, that the better method in these cases is constant communication and cooperation, rather than appeal and litigation.

Therefore, the decision of the Hearing Officer for Blaine County is affirmed in part and reversed in part.

DATED JULY 14, 1981.

BEFORE ED ARGENBRIGHT, SUPERINTENDENT OF

PUBLIC INSTRUCTION FOR THE STATE OF MONTANA

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IN RE: THE APPEAL OF)
)
BOARD OF TRUSTEES OF FLATHEAD) DECISION AND ORDER
COUNTY SCHOOL DISTRICT NO. 5)

****

This appeal stems from a decision rendered by Wallace D. Vinnedge, County Superintendent of Schools, Flathead County, rendered on March 3, 1981, ordering the reinstatement of Neil Hart, a tenure teacher. The appellant, Flathead County School District No. 5, Board of Trustees, filed a timely notice of appeal. This matter was noticed for submission to the State Superintendent and briefs having been received and oral argument not having been requested, this matter is deemed submitted to the Superintendent for decision.

Neil Hart was a tenure teacher in the Kalispell school system for twenty-three years (23) years, during which time he taught at the Kalispell Junior High School, approximately thirteen (13) years. By letter dated December 8, 1975, the then Principal of Kalispell Junior High School, warned Hart, concerning an incident of physical abuse to a student. On May 27, 1977, Mr. Patrick T. Hayden, then School District No. 5 Superintendent, warned Mr. Hart that, "any future exercise of physical punishment on your part, that exceeds the limits of the law, good judgment, or Board policy, will result in disciplinary action by the Board, including the strong possibility of dismissal."

On February 3, 1981, the Trustees of School District No. 5 delivered a letter to Hart stating, "an intent to dismiss from employment for unfitness and violation of adopted policies which charged that:

1. On January 16, 1981, during your fourth (4th) period Biology class, you pulled Heath Halden's hair. The mother called to inform

the school of the hair pulling incident, and that it had left a welt.

2. On January 20, 1981, during a third (3rd) period study hall which you supervised, you struck Randy Birky on the head with your hand.

3. On January 22, 1981, during your third (3rd) period study hall, you used physical force, by grabbing Cary Snyder by the shirt, forcing him into the wall and an arm lock to physically take him to the office."

Following the delivery of this letter, a hearing was held before the Board of Trustees for School District No. 5, on February 27, 1981, during which time testimony was received from both sides.

After hearing the testimony, the County Superintendent made detailed findings with regard to each of the three (3) incidents complained of in the Trustees' February 3, 1981 letter. After making these detailed and comprehensive findings, the County Superintendent concluded that the incidents of January 16, 1981, January 20, 1981, and January 22, 1981, were not of sufficient nature of corporal punishment to justify dismissal of the teacher, even in view of the reprimands made in 1975 and 1977.

SCOPE OF REVIEW

This is an Administrative Appeal, before the State Superintendent of Public Instruction and I am governed by the Montana Administrative Procedure Act, § 2-4-704, M.C.A. which provides:

> Standards of Review. (1) The review shall be conducted by the court without a jury and shall be confined to the record. In cases of alleged irregularities in procedure before the agency not shown in the record, proof thereof may be taken in the court. The court, upon request, shall hear oral argument and receive written briefs.
> (2) The court may not substitute its judgement for that of the agency as to the weight of the evidence on questions of fact. The court may affirm the decision of the agency or remand the case for further proceedings. The court may reverse or modify

the decision if substantial rights of the appellant have been prejudiced because of the administrative findings, inferences, conclusions, or decisions are:

(a) in violation of constitutional or statutory provisions;
(b) in excess of the statutory authority of the agency;
(c) made upon unlawful procedure;
(d) affected by other error of law;
(e) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record;
(f) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion; or
(g) because findings of fact, upon issues essential to the decision, were not made although requested.

Also see, Standard Chemical Manufacturing Company vs. Employment Security Division (1980) _____ Mont. _____, 37 St. Rep. 105 and Martinez v. Yellowstone County Welfare Department (1981) _____ Mont. ___P. 2d. ____ 38 St. Rep. 474, which provides that it is not the duty of the reviewing administrator to sustitute his judgment for that of the administrative decision maker.

Student discipline, implementation of Board Policy, and teacher discipline are all matters of local concern, which I intend to emphasize, not diminish during my administration. At the same time, I am bound by state law to review the evidence presented to the County Superintendent and to determine whether or not his decision was based on substantial evidence. If I am to reverse his findings, I must do so only if they are clearly erroneous or constitute an abuse of discretion.

The transcript of these proceedings plainly indicates that the Flathead Superintendent conducted a very professional and thorough hearing. Both sides had every opportunity to present their cases, and I am sure that the matter presented to the County Superintendent was one that took a great deal of time and effort to decide.

I cannot find that his decision was clearly erroneous in view of the facts presented or that his decision constituted an abuse of discretion.

There was substantial evidence to support the decision reached by

the Flathead County Superintendent of Schools and I cannot, nor will I substitute my own opinions after reviewing this "cold" record, for the one who sat in front of the witnesses, viewed their demeanor, and heard their words and observed their reactions during the entire proceeding. The decision of the Flathead Superintendent of Schools is therefore affirmed.

DATED SEPTEMBER 23, 1981.

BEFORE THE SUPERINTENDENT OF PUBLIC INSTRUCTION

OF THE STATE OF MONTANA

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In the matter of the Appeal of)
) DECISION AND ORDER
PETRONELLA SPOTTED WOLF)

****

This is an Appeal from a Decision of the Glacier County Superintendent of Schools, relative to the award of Room and Board Contract, pursuant to Section 20-10-143 (3) M.C.A.. The Appellant is a Sixty-Five (65) year old woman, who resides in her home near Heart Butte, Montana, on the Blackfeet Indian Reservation with her two grandchildren. During the winter she rents a house in Browning, Montana, where her grandchildren attend school. A hearing was held before the School District and before the County Superintendent, concerning the denial of Room and Board Contract for the year 1980-1981.

It is clear from the record and from information obtained from the parties, that the Appellant has received Room and Board Contract from the County, since approximately 1973.

No transcript of the proceedings is available to the State Superintendent, however the parties have stipulated to the record and the relevant facts involved.

It is the position of the School District and the County Superintendent, that the Appellant failed to prove the isolation factors necessary to the award. A map submitted in these proceedings indicates the Spotted Wolf residence is located approximately 8.4 miles from Highway 89, and 1.4 or 1.6 miles from the connector to Highway 89.

The road from the Spotted Wolf residence to the connector is not maintained during the winter months.

While it is not the position of the Superintendent to readjudicate

every factual determination of County School Districts or County Superintendents, there are certain facts in this case which require the reversal of the local determination.

The Appellant has received this Room and Board Contract since 1973. In order for that determination to have been made on a District or County level, there must have been a determination of impassable roads, and or extreme distances which make it impractical to transport the pupil to school or bus regularly. Indeed the Appellant presented such testimony to the District and the County Superintendent again this year, however, it has now been deemed to be insufficient.

There are many arguments which militate against the over-ruling of local determinations in any controversy and particularly school controversies. There are also certain principles and guides of reasonableness, which must be employed as a check or guide to these local determinations. The Superintendent has published a guide for determining the degree of isolation allowed to increase the individual transportation rate; the road conditions, distances and other factors which are to be considered are clearly set forth in that guide and are recommended to each locality. It goes without saying, however, that a long term award of a Room and Board Contract, must have been based upon a determination of isolation, either because of distance, road conditions, or other factors.

In such a situation as this, where the Room and Board Contract has been ongoing for a period approximately seven (7) to eight (8) years, it would seem to be the local district transportation committee and County Superintendent's responsibility to prove changed circumstances which militate against the Room and Board Contract for 1980-1981.

Since no new matters appear, the Order of the Glacier County Trans-

portation Committee and County Superintendent must be and is hereby reversed, with instruction to the Chairman of the County Transportation Committee, the County Superintendent, to issue a Room and Board Contract to the Appellant Forthwith.

DATED AUGUST 31, 1981.

BEFORE THE SUPERINTENDENT OF PUBLIC INSTRUCTION

OF THE STATE OF MONTANA

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In the matter of the Appeal of)
LYNN HILLER, et al.) DECISION AND ORDER

****

This Appeal is from a decision of the Missoula County Superintendent of Schools issued June 22, 1981.

Both parties have appealed from that decision and pursuant to Notice and Schedule issued by this office, briefs and reply briefs were submitted by each side. Neither party has requested oral argument and since the time for such request has expired this matter is deemed ready for decision.

The basic issue presented by the Appeal arises from the decision made by the Board of Trustees of School District No. 1, Missoula County, made on March 9, 1981 which established Roosevelt, Meadow Hills, C.S. Porter, Washington and Lowell as upper grade schools and Paxson, Willard, Cold Springs, Russell, Hawthorne, Dickinson, Franklin, Jefferson, Lewis and Clark and Whittier as lower grade schools. The decision on March 9, 1981 culminated a longstanding concern of the Board of Trustees regarding the organization and structure of its schools in Missoula County. The decision of the Board of Trustees was brought before the County Superintendent and heard on May 28, May 29, June 1, June 2 and June 3, 1981. The testimony covers over 500 pages of transcript and includes the testimony of the individual members of the Board of Trustees, parents, administrative officers and expert witnesses.

The decision issued on June 22, 1981 contains findings of fact, conclusions of law and decree. That decision is subject to review by the State Superintendent of Public Instruction pursuant to the Administrative Procedure Act of Montana found in Section 2-7-704, M.C.A., which

provides:

> 2-7-704. Standards of review. (1) The review shall be conducted by the court without a jury and shall be confined to the record. In cases of alleged irregularities in procedure before the agency not shown in the record, proof thereof may be taken in the court. The court, upon request, shall hear oral argument and receive written briefs.
>
> (2) The court may not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact. The court may affirm the decision of the agency or remand the case for further proceedings. The court may reverse or modify the decision if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are:
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> (a) in violation of constitutional or statutory provisions;
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> (b) in excess of the statutory authority of the agency;
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> (c) made upon unlawful procedure.
>
> (d) affected by other error of law.
>
> (e) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record;
>
> (f) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion; or
>
> (g) because findings of fact, upon issues essential to the decision, were not made although requested. (Emphasis supplied.)

Specifically, the conclusions of law set forth by the Missoula County Superintendent provided in part:

> II. The Board of Trustees of School District No. 1 abused its discretion by acting arbitrarily and capriciously in approving the motion of March 9, 1981 as the organizational plan for District No. 1 as the Board did not have a sufficiently detailed plan before it to vote upon.
>
> III. The Superintendent of Schools of Missoula County has a legal authority to vacate the March 9, 1981 and May 6, 1981 decisions of the Board of Trustees of School District No. 1 regarding the reorganizational plan and to remand the matter to the Board for further action consistent with these findings. (Emphasis supplied.)

Looking first to the Montana Constitution, Article X, Section 8 provides:

> School District Trustees. The supervision and control of schools in each school district shall be vested in a board of trustees to be elected as provided by law.

The statutory powers of the county superintendent are set forth in Section 20-3-205, M.C.A.

Several statutes set forth the power and duties of the board of trustees, including Section 20-3-324, M.C.A., (2), (7), (16), (17) and Section 20-6-501,

M.C.A.

There is no question that the County Superintendent had the authority, under Section 20-3-210, M.C.A., to hear this controversy Appeal from a decision of the Board of Trustees.

As can be noted above, no specific statutory authority was found by the County Superintendent in his decision to have been violated by the March 9, 1981 decision of the Board of Trustees of Missoula School District No. 1. In addition, both parties have cited the case of School District No. 12 vs. Hughes and Colberg 170 Mt. 267, 552 P. 2d. 328 (1976) in support of their positions. While that case does provide that local boards of trustees are subject to legislative control and do not have control over local schools to the exclusion of other governmental entities, there are no statutory limitations on the power of the local board to reorganize in the manner accomplished by the March 9, 1981 decision. Specifically, there is no statutory definition as to what is to be included or excluded from a "reorganization plan." The transcript in the instant case is replete with testimony and exhibits indicating the extensive review accorded the subject of the reorganization of Missoula elementary schools. Based on a review of the transcript and exhibits and the decision of the Missoula County Superintendent, there does not appear to me to be an abuse of discretion or arbitrary and capricious action exercised by a majority of the District Trustees at their March 9, 1981 meeting. Indeed, what the County Superintendent's ruling appears to be about is whether or not the Missoula County Superintendent has the constitutional or statutory authority to determine the elements of a reorganizational plan. I hold that he does not. The Missoula County Superintendent's conclusions of law, II. and III., relating to that plan are reversed on the grounds and for the reasons that the decision of the Missoula County

Superintendent was in excess of his constitutional and statutory authority and constituted error as a matter of law.

This is not to say that the County Superintendent serves no function in the administrative structure of school governance in Missoula County. To be sure, it was before him that the full story of the facts and circumstance surrounding this decision were brought out. It was before him that these matters were given a full and fair hearing. This is an essential role in the governance of local schools which I intend to support whenever possible. In the instant case, however, a conflict between the Board and the County Superintendent must be resolved in favor of the discretion granted to the Board of Trustees by the Constitution and statutes of this state. See Article X, Section 8, Montana Constitution, Section 20-3-324, M.C.A., and 20-6-501, M.C.A.

The decision of the Missoula County Superintendent, dated June 22, 1981, is vacated and reversed and the decision of the Missoula County School District No. 1 of March 9, 1981 is reinstated.

DATED OCTOBER 29, 1981.

BEFORE THE SUPERINTENDENT OF PUBLIC INSTRUCTION

OF THE STATE OF MONTANA

****

In the matter of the Appeal of)
LAYMEYER, RENNER and SIBLEY) DECISION AND ORDER

****

This is an appeal from the Decision of Valley County Superintendent of Schools, ALFREDA S. DRABBS, rendered December 19, 1980, which upheld the Decision of the Board of Trustees for School District No. 13 to continue with a half day Kindergarten program.

This appeal arises because of the decision of the local Board of Trustees to continue a half day Kindergarten program after numerous hearings at which the appellants or some of them were present and after the submission of evidence and testimony by others to the Board. The decision of the Board of Trustees for School District No. 13 was appealed to the County Superintendent who rendered a decision affirming the ruling of the Board of Trustees.

This matter was noticed for submission to all parties and the time for submission of documents having expired, it appears that the parties have submitted all of their arguments and reasons related to this appeal.

It appears from the documents submitted by the appellants that they are dissatisfied with the decision of the Board of Trustees based on the sufficiency of the investigation and evidence available to the Board at the time its decision was made. The Trustees rely on Montana law which establishes the rule of the Board of Trustees as well as certain policy statements from the Board of Public Education and the State Superintendent of Public Instruction.

In view of this dispute over the facts submitted to the Trustees, I feel that the issue raised herein deals with the sufficiency of the facts available to the Trustees, upon which their decision is based. From the transcript it appears that several public meetings or hearings were held

on the issue of half day Kindergarten versus full day Kindergarten and that there was significant public involvement both at the hearings and meetings as well as indirect involvement through petitions which were also submitted to the Board of Trustees.

Article X, §8 of Montana's 1972 Consitution provides:

> "The supervision and control of schools in each School District shall be vested in a Board of Trustees, to be elected as provided by law."

The Montana Supreme Court has examined this provision in School District No. 12, Phillips County vs. Hughes, 552 P. 2d. 328, 170 Mont. 267 (1976). There the Supreme Court recognized and approved the Constitutional intent that local autonomy should be preserved in school matters. There are of course limits to this local autonomy and avenues of appeal such as this one, to protect against abuses of power or excesses of state law.

I note that no such matter is alleged by the appellants, nor is one evident in the transcript of the hearing before the County Superintendent. I also note §20-3-323 M.C.A. which provides:

> 1. The Trustees of each district shall prescribe and enforce policies for the government of the district. In order to provide a comprehensive system of governing the district, the trustees shall:
>
> a) adopt the policies required by this title; and
> b) adopt policies to implement or administer the requirements of the general law, this title, the policies of the board of public education, and the rules of the Superintendent of Public Instruction.

Further, Montana's school laws in §20-1-301 M.C.A. and §20-1-302 M.C.A. establishes minimum school education standards for Montana schools, including a provision that "a school day of public instruction shall be at least two hours for Kindergartens..." Variance procedures are granted to the Superintendent of Public Instruction who is to follow the policies of the Board of Public Education. Our Board of Public Education has adopted a Policy Statement on Kindergarten variances, dated March 12, 1974, which recognizes "the normal half day attendance pattern for Kindergarten classes"

and encourages "local districts to design and propose Kindergarten schedules suited to their particular situations."

To be sure, the documents and testimony submitted by the appellants reflect a sincere effort to present the best facts to their Board and County Superintendent. Their letter on this appeal also reflects a significant public sentiment for an all day Kindergarten program. By this decision I am not discouraging interested citizens from presenting the most complete set of facts to their local Board of Trustees and District and County Superintendent. I am also of the opinion that both all day and half day Kindergarten programs have their place within Montana's educational framework and that I am sure that there is possibility of change at the Nashua Schools in future years.

However, my review of the decision of the County Superintendent as well as the reasons for the decision testified to by the members of the Board of Trustees at that hearing indicate to me that the essentials of due process were followed below and that an adequate and legal basis for a decision by the Board of Trustees existed for them to make their decision concerning the type and length of program to be offered at the Kindergarten in Nashua Schools. Since there appears to be no legal basis for overturning the decision of the County Superintendent, I will not substitute my decision for that of the County Superintendent and Trustees who had the opportunity to view and review the evidence first-hand and listen to the witnesses.

The decision of the County Superintendent is affirmed.

DATED JUNE 11, 1981.

SECTION II

BOARD OF PUBLIC EDUCATION POLICY
RE: COMPULSORY ATTENDANCE

BEFORE THE BOARD OF PUBLIC EDUCATION
OF THE STATE OF MONTANA

In the matter of the adoption) NOTICE OF ADOPTION OF RULE
of ARM 10.65.301 and following) 10.65.301 AND FOLLOWING
pertaining to school attend-) COMPULSORY SCHOOL ATTENDANCE
ance.

To: All Interested Persons:

1. On September 21, 1981 the Board of Public Education published notice of a proposed adoption of a rule concerning school attendance at page 1082 of the 1981 Montana Administrative Register, issue number 18.

2. The agency has adopted the rule with the following changes:

10.65.301 GENERAL (1) The board of public education shall determine whether a private institution provides instruction in the program the board prescribes.

(2) The board of public education has designated as the basic instructional program the educational curriculum set forth in the Administrative Rules of Montana 10.55.402 and 10.55.403 as amended for application to private institutions.

(3) Students governed by compulsory attendance statutes, who are not enrolled and attending a public school must be enrolled in a private institution providing a basic instructional program as provided by the board of public education or be excused under another aspect of 20-5-103(2).

~~(4) Instruction to children by their parents at home is not to be considered as providing a basic instructional program for the purpose of complying with the law and this policy.~~

AUTH: 20-2-121, MCA IMP: 20-7-111, MCA.

10.65.302 PROCEDURES FOR ATTENDANCE OFFICER (1) The attendance officer is mandated to enforce the compulsory attendance provision of Montana school law and has been vested with the necessary police and investigatory powers to enforce compulsory attendance provisions of Montana law to ensure the children are enrolled and attending a public school or enrolled in a private institution which provides ~~instruction in the programs prescribed by the board of public education~~ the basic instructional program;

~~(2) It is the responsibility of the attendance officer to ensure that all children are enrolled and attending a public school or are enrolled in a private institution which provides a basic instructional program~~ as described in 10.55.402 and 10.55.403 of the Administrative Rules of Montana.

(2) ~~(3)~~ In the capacity of enforcing compulsory school attendance law the attendance officer ~~shall~~ may notify the county superintendent of his county of the existence of the ~~non-public school~~ private institution after determining that a child is enrolled in a ~~non-public school~~ private institution.

(3) ~~(4)~~ The attendance officer shall, at the discretion of the county superintendent, accompany and/or assist the county superintendent in the county in determining whether the non-public school is providing the basic instructional program as prescribed.

AUTH: 20-2-121, MCA IMP: 2-5-101, MCA; 20-5-102, MCA.

10.65.303 PROCEDURES FOR COUNTY SUPERINTENDENT (1) The county superintendent as an elected local school official must meet certain teaching and administrative qualifications in school matters. The county superintendent has general supervision of the schools of his county and is responsible to perform any duty prescribed by the board of public education.

~~(5)~~ (2) The office of public instruction will provide technical assistance to all county superintendents, upon their request, so they in turn can perform the mandates of this policy.

(3) The governing authority of a private institution may request the attendance officer to contact the county superintendent for a determination of whether a private institution is providing a basic instructional program.

~~(2)~~ (4) The county superintendent, upon request by the attendance officer, shall contact the governing authority of the private institution ~~will annually determine~~ and determine annually whether the children within his county who are attending a ~~non-public school~~ private institution are receiving a basic instructional program as set forth by the board of public education.

~~(3)~~ (5) If the county superintendent determines that the ~~non-public school~~ private institution is providing a basic instructional program as prescribed, the county superintendent shall notify the attendance officer that the ~~non-public school is~~ a private institution is providing the basic instructional program to the children of that ~~private~~ institution and is therefore in compliance with the compulsory attendance law.

~~(4)~~ (6) Should the county superintendent ~~of schools~~ determine that the children attending a ~~non-public school~~ private institution are not receiving a basic instructional program, he shall specify the deficiency(ies) to the governing authority of the institution and may allow the latter a reasonable probationary period of up to six months in which to correct the deficiency(ie), after which probationary period he shall report the same to the local attendance officer who then, if necessary shall pursue the remedies provided by law to assure that proper compulsory attendance at an institution with at least the basic instructional program is provided.

(7) The governing authority of a private institution which is found by the county superintendent not to provide a basic instructional program may appeal the county superintendent's decision to the board of public education and the board shall apply the Administrative Procedures Act in this appeal.

AUTH: 20-2-121, MCA IMP: 20-3-205(22), MCA

3. At the public hearing which was held November 5, 1981 twenty-eight persons testified on the proposed rule. Their testimony falls into eleven categories each of which the board of public education specifically addresses as follows: (a) There was concern that the rule violates the U.S. and Montana Constitution. The board disagrees, citing a narrative of William B. Ball on Constitutional Protection of Christian Schools submitted to the board by the Lewis and Clark Christian Academy which states in part: "Government may pose reasonable requirements pertaining to health, safety, sanitation and a basic core of learning. ... Those state truancy laws which require a child to have a basic modicum of education in a safe and

healthful environment are, in my view, valid" (emphasis is the author's). Similarly, the Montana Constitution as interpreted by the attorney general of Montana gives the board the authority to make reasonable requirements that a basic core of learning is provided to all children.

(b) There was concern that the rule violated parental choice of education by making public education mandatory. The board disagrees, citing William B. Ball, referred to above: "There would appear to be a compelling state interest that a child learn the language of his country (reading, writing, spelling), its history, geography and form of government, and how to compute. Our society would be chaotic if people lacked these forms of knowledge - especially English communication." The board emphasizes that the proposed rule does not mandate public education; it merely assures the elements of basic instruction.

(c) There was concern that the rule prohibited instruction to children by parents at home. The board has deleted the prohibition. See 10.65.301(4).

(d) There was concern that the rule did not provide an administrative appeals procedure. The board has amended the rule to provide an appeals procedure. See 10.65.303(7).

(e) There was concern that parents were not given an opportunity to correct deficiencies of the private institution in the basic instructional program. The board has amended the rule to provide a reasonable probationary period in order for the private institution to comply with the basic instructional program. See 10.65.303(6).

(f) There was concern that the proposed procedure was not uniform in statewide application. In response to this concern, the board notes Montana's fundamental principle of allowing educational decisions to be made at the local level, and that any potential abuse of local discretion shall be corrected by the board on appeal, thereby assuring uniformity of application of this rule.

(g) There was concern that the proposed rule interfered with the free exercise of religion and the ministry of the church. The board disagrees, citing William B. Ball, referred to under (a) and (b): "There has been widely circulated in fundamentalist circles, over the past two years, the view that, since God has founded the Christian school, government has no rights whatever respecting it. This view is without any foundation whatever in the Constitution of the United States. And here I am referring to a view of our Constitution which regards religious liberty as the most sacred of our liberties." Specifically, nothing in the basic instructional program as prescribed by the board interferes with the free exercise of religion or the ministry of the church.

(h) There was concern that the board of public education is not providing a procedure whereby private elementary schools can request accreditation. The board agrees. However, the request lies outside the scope of the law; the Montana Legislature has specifically limited accreditation to non-public high schools when made by request.

(i) There was concern that the board of public education is treating private institutions and public schools differently. The board disagrees; procedures for private institutions

and public schools are characterized by the same features, to wit: a core program, an annual review, a probationary period and an appeal.

(j) There was concern that the county superintendent would not contact the proper authority of the private institution. The board responds by amending the rule to require specifically that the county superintendent identify the proper governing authority of the private institution. See 10.65.303 (4).

(k) There was concern that the basic instructional program as defined by the board was awkward when applied to private institutions. The board responds by amending the basic instructional program for application to non-public schools. See 10.65.301(2).

ALLEN D. GUNDERSON, CHAIRMAN
BOARD OF PUBLIC EDUCATION

BY: _____
Assistant to the Board

Certified to the Secretary of State December 21, 1981.

STATE OF MONTANA

BOARD OF PUBLIC EDUCATION

I, Allen Gunderson, Chairman of the Board of Public Education of the State of Montana, by virtue of and pursuant to the authority vested in me by 20-2-121 MCA do promulgate and adopt the annexed rules and regulations to-wit:

ADP: 10.65.301 COMPULSORY SCHOOL ATTENDANCE

as a permanent rule of this agency.

This order after first being recorded in the order register of this agency shall be forwarded to the Secretary of State for filing.

APPROVED AND ADOPTED December 21, 1981

CERTIFIED TO THE
SECRETARY OF STATE December 21, 1981

BY _____
ALLEN D. GUNDERSON, CHAIRMAN
BOARD OF PUBLIC EDUCATION

SECTION III

MISCELLANEOUS OPINIONS

SALARIES FOR SPECIAL EDUCATION BUS AIDES

Special education includes "related services." "Related services" is defined as other activities necessary to provide for a basic education for a handicapped child and it includes transportation.

Under Title 20, Chapter 10 of the Transportation and Food Services of Montana Code Annotated, Section 20-10-143 states in part:

> (1) The trustees of any district furnishing transportation to pupils who are residents of such district shall have the authority and it shall be their duty to provide a transportation fund budget that is adequate to finance such district's transportation contractual obligations and any other transportation expenditures necessary for the conduct of its transportation program. The transportation fund budget shall include:
>
> (a) an adequate amount to finance the maintenance and operation of district owned and operated school buses;
>
> (b) the annual contracted amount for the maintenance and operation of school buses by a private party;
>
> (c) the annual contracted amount for individual transportation, including any increased amount due to isolation, which shall not exceed the schedule amount prescribed in 20-10-142;
>
> (d) any amount necessary for the purchase, rental or insurance of school buses; and
>
> (e) any other amount necessary to finance the administration, operation, or maintenance of the transportation program of the district, as determined by the trustees. (emphasis supplied)

This particular statute allows great discretion and authority for the Board of Trustees to acquire and provide transportation for pupils in the district. The discretionary authority of the trustees includes the payment of salaries to special education bus aides from a transportation fund budget.

INTERPRETATION OF §20-5-301 - 303 M.C.A.

An elementary student need not fulfill the requirements set forth in §20-5-301 and §20-5-302 M.C.A. before another elementary school district can accept that child. §20-5-303 M.C.A. allows a parent and a nonresident elementary school district to agree to accept and educate the child in that school district. The statute is discretionary and leaves it up to the nonresident school board to determine whether in fact a parent may send his/her child to that nonresident elementary school. It also provides that the parent is responsible for the expense of tuition if and when the nonresident school board accepts the child and requires payment of tuition.

With regard to transportation for the child to attend the nonresident elementary district, if a child does not meet the requirements of §20-10-101 (2 M.C.A. and become an eligible transportee, then the nonresident elementary district and the resident elementary district are not responsible for the transportation costs of the child. This does not prevent, however, either the resident school district or the nonresident school district from providing transportation for this child in attending this school at the school's expense. Again, that is left within the discretion of the local school board.

EARLY GRADUATION FOR SENIORS

The 1981 Montana Legislature amended Section 20-1-301 M.C.A. to allow a variance for graduating seniors to complete 175 days of the 180 days required for the school term. An examination of the committee report and the statements made in the committee during the 1981 session indicates that the intent of the Legislature was to limit the early graduation to high school seniors.

At this time, there are no Attorney General opinions or court decisions on the matter. However, it is the opinion of this office that the application of the variance with the term graduating seniors and the expression of the legislator who introduced the amendment indicates that high school seniors and no other grades would be allowed early graduation.

SANCTIONS FOR NONCOMPLIANCE WITH SCHOOL IMMUNIZATION LAW

According to Section 20-5-410 M.C.A., anyone who violates the provisions of the immunization law is subject to a fine not to exceed $500. Since the enforcement provisions designate the "governing authority" as the entity responsible for enforcing the statute, it would indicate that the school board, as well as the principal or superintendent of the school would be liable for failure to enforce the law and therefore subject to the sanctions contained in the statutes.

Private institutions are also required to comply with the provisions of the immunization law. The Health Department has advised this office that they will be conducting a validation survey to determine, on a random basis, if both public and private schools are complying with the law.

SECTION IV

REFERENCE

REFERENCE LIST
DIVISION OF LEGAL SERVICES
OFFICE OF PUBLIC INSTRUCTION

REFERENCE BOOKS

Administrative Rules of Montana

Attorney General Opinions - Volume 14 - 39, Indexed for Education

Montana Administrative Register

Montana Code Annotated

Montana Digest (Covering State and Federal Cases)

Montana Reports (Cases Argued in the Montana Supreme Court)

Revised Codes of Montana

Special Education Rules and Regulations Manual

RESOURCE BOOKS

Bolmeier, E.C. Legality of Student Disciplinary Practices. 1976.

Elkouri, Frank and Elkouri, Edna Aspen. How Arbitration Works. 1973

Fischer, Louis and Schimmel, David. The Civil Rights of Teachers. 1973.

Gee, E. Gordon and Sperry,David. Education Law and the Public Schools, A Compendium. 1978.

Goldstein, Stephen R. Law and Public Education. 1974.

Nolte, M. Chester. Duties and Liabilities of School Administrators. 1973.

Nolte, M. Chester. Law and the School Superintendent, 2nd Edition. 1971.

Punhee, Harold. The Teacher and the Courts. 1971.

Reutter, Jr., E. Edmund and Hamilton, Robert R. The Law of Public Education, 2nd Edition. 1976.

Rubin, David. The Rights of Teachers. 1973.

Schimmel, David and Fischer, Louis. The Civil Rights of Students. 1975.

Wollett, Donald H. and Chanin, Robert H. The Law and Practice of Teacher Negotiations. 1973.

RESOURCE INFORMATION

Alcohol and Drug Abuse:

The Montana Teacher's Guide for Alcohol Education. A School-Based Alcohol Education Resource.
Also contact: C.T. Canterbury
Alcohol & Drug Abuse Division
Department of Institutions
Helena, Montana 59620
449-2827

Constitutional Convention: (Montana)

Minutes or Proceedings
Report of Education Committee
Bill of Rights, Re: Education

Discipline:

Statutes regarding Student Discipline
Suggested Guidelines for Student Conduct and Discipline

Financial:

Information concerning the Federal Block Grant Program
Requirements for the Issuance of School Bonds
Assessing School Fees

Labor Law:

Reduction in Force: Legal Issues and Recommended Policy
Federal Regulation of Employment Service: Labor Disputes

Nepotism:

Background and Interpretation of the Nepotism Law

Operations:

Rules for School Buildings
Use of School Facilities by Religious Organizations

Private Schools:

Background Materials
Attorney General Opinions
Board of Public Education Policy

Records:

Access to Records
Buckley Amendment
Right of Privacy

Special Education:

Information on both Federal and State Laws & Regulations
Requirements for Private Schools

Student Rights:

Censorship
Proposed Codes of Conduct

Title IX:

A Student Guide to Title IX
Title IX Grievance Procedures
Final Title IX Regulations
Enforcing Title IX

LEGISLATIVE INFORMATION

House Bills Introduced - 1981 Session
Senate Bills Introduced - 1981 Session

Journal of the Montana House of Representatives - 1973-81
Journal of the Montana Senate - 1973-81

Laws of Montana - Session Laws - 13th-47th Legislative Sessions

For additional information contact:

Cheri Bergeron
Resource Center
Office of Public Instruction
Helena, Montana 59620
449-2082